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- c) the ADA of 1990 defined “disability” as:
 - “a physical or mental impairment that substantially limits one or more of the major life activities of such individual,”
 - “a record of such an impairment,” or
 - “being regarded as having such an impairment”
2. The Rehabilitation Act of 1973 (§504) (29 U.S.C. §794)
 - a) before we had even the predecessor to the Individuals with Disabilities Education Act (IDEA), Congress enacted a provision dealing not only with children with disabilities and the prohibition from discriminating against them so as to deny ready access to any program or activity receiving federal financial assistance, but also to prohibit discrimination in the work place based upon a disability
 - 1) the ADA of 1990 did not define the terms “physical or mental impairment,” “substantially limits,” or “major life activities”
 - 2) because the ADA of 1990 failed to define these highly significant and critical terms and even with the Equal Employment Opportunity Commission (EEOC) adding its two cents worth as to the import of these terms, the legal stage was set for court decisions, including by the Supreme Court of the United States, interpreting the meaning of these terms and overall the outcomes of those decisions were to apply the meaning of those terms parochially and to restrict the nature of physical/mental health conditions or impairments deemed to be covered by the ADA of 1990
 - b) multiple §504 cases got to the United States Supreme Court for a determination as to “who is handicapped” and did the statute create a “private right of action” for damages, *e.g.* Southeastern Community College v. Davis, 442 U.S. 397 (1979), and School Board of Nassau County v. Arline, 480 U.S. 273 (1987)
 - 1) in Arline, *supra*, the Supreme Court noted Congress had expanded the definition of “handicapped individual” to mean “[a]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment”
 - Arline involved an elementary school teacher who experienced a recurrence of tuberculosis after that health condition had been in remission for twenty years and was discharged in her employment
 - the teacher initiated litigation claiming she had been discriminated against under §504
 - the Federal regulations implementing §504 had defined “physical impairment” and “major life activities”
 - the United States Supreme Court affirmed the lower appellate court’s conclusion that Arline’s condition “falls . . . neatly within the statutory and regulatory framework” of §504 and remanded the case for a factual determination of whether Arline was “otherwise qualified” for her job as a teacher and whether the school board could reasonably accommodate her
 - c) the Supreme Court in Irving Independent School Dist. v. Tatro, 468 U.S. 883 (1984), considered whether a student had been discriminated against by a school district failing to provide a handicapped child with clean intermittent catheterization during school hours
3. The ADA of 1990 adopted the same definition of disability as found in §504
 - a) in view of the fact the ADA of 1990 had not defined the key terms of “physical or mental impairment,” “substantially limits,” and “major life activity,” the Supreme Court dealt with the issue of who is “disabled” in Sutton v. United Airlines, Inc., 527 U.S. 471 (1999)
 - the airline successfully argued that sisters who had applied for and were denied positions as airline pilots had not been discriminated against because they were not disabled when

taken into consideration was the ameliorative effects of corrective lenses; the twin sisters had argued that mitigating measures should not be factored in when considering the definition of who is disabled to determine whether a person is substantially limited in a major life activity

- b) in 2002, the United States Supreme Court decided the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), wherein it was determined an employee with carpal tunnel syndrome was not substantially limited in the major life activity of working because she was not also limited in at least one other major life activity; the Supreme Court strictly interpreted the terms “substantial” and “major” relying in significant part on the 1990 finding in the ADA of 1990 that “43 million Americans have disabilities” and reasoning that if Congress had intended that everyone with a physical impairment that precluded them from performing a particular task qualified as disabled, the congressional findings would have been much higher
- B. The legislative branch plays its trump card — the ADAAA
- 1. Congress responded in 2008 to the United States Supreme Court’s decisions interpreting the ADA of 1990 and as well to certain regulations of the EEOC
 - 2. The preamble to ADAAA forbodes what follows in the Act by unequivocally stating its goal to be — “To restore the intent and protections of the Americans with Disabilities Act of 1990”
 - 3. The ADAAA contains “new” findings from those expressed in 1990 and these findings are a lynchpin to understanding the amendments:
 - a) “in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act ‘provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities’ and provide broad coverage;
 - b) “in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;
 - c) “while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;
 - d) “the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;
 - e) “the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;
 - f) “as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;
 - g) “in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term ‘substantially limits’ to require a greater degree of limitation than was intended by Congress; and

- h) "Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard."
4. Congress also set forth several "purposes" for the ADAAA which are also important to understanding the amendments and what may reasonably be anticipated in the future application of the amendments:
- "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA;
 - "to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
 - "to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
 - "to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 194 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives';
 - "to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 194 (2002) for 'substantially limits', and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and
 - "to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term 'substantially limits' as 'significantly restricted; to be consistent with this Act, including the amendments made by this Act."
5. The ADAAA amendments, with the basic definition of disability remaining as: a physical/mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment, are:
- major life activities (not defined in the ADA of 1990)
 - list of major life activities includes:

- caring for one's self	- walking	- learning
- performing manual tasks	- standing *	- reading *
- seeing	- lifting *	- concentrating *
- hearing	- bending *	- thinking *
- eating *	- speaking	- communicating *
- sleeping *	- breathing	- working

* added to those previously set out in EEOC regulations

- a major life activity also includes the operation of a major bodily function (all new):

– immune system	– bowel	– brain	– endocrine
– normal cell growth	– bladder	– respiratory	– reproductive
– digestive	– neurological	– circulatory	
- b) regarded as having an impairment (not defined in the ADA of 1990)
 - if individual can demonstrate they have been subjected to an action prohibited under the Act because of an actual or perceived physical/mental impairment irrespective of whether that impairment limits a major life activity
 - an individual is not to be regarded as having an impairment if such is only transitory and minor, *i.e.*, actual or expected duration of six months or less
- c) rules of construction regarding the definition of disability
 - the definition of “disability should be construed to favor broad coverage to the maximum extent permitted by the ADAAA
 - the term “substantially limits” should be construed consistently with the findings and purposes of the ADAAA
 - an impairment that substantially limits one major life activity need not limit other major life activities in order to be a disability
 - an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active
 - the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, *e.g.*, medication, medical supplies, equipment, appliances, hearing aids
- 6. The focus under the ADAAA is clearly now of whether an individual has been discriminated against on the basis of a disability
- 7. The ADAAA grants authority to the EEOC, the United States Attorney General, and the Federal Secretary of Transportation to issue regulations
- 8. The definitions for the terms “disability” and “individual with a disability” are bootstrapped and made applicable to §504

C. Implications of and compliance with the ADAAA

1. In employment
 - a) many more school employees could be considered disabled
 - b) it is imperative that job descriptions be reviewed and essential functions as contrasted with marginal functions be clearly identified
 - make sure each employee has received a copy of the job description applicable to the employment position(s) held with the school district and invite Q and A on this topic
 - c) emphasize with “management” level employees the importance of the interactive process relating to a claim by an employee as being disabled regarding the issue of reasonable accommodation
 - what does the employee seek to do or have done that will allow them to continue to perform the essential functions of their job even with the claimed disability
 - documentation is an absolute necessity as to each step of the interactive process including information requested from the employee
 - develop procedures for handling reasonable accommodation requests from employees and distribute such procedures to appropriate staff
 - do not be too quick to draw conclusions about claimed impairments

- d) review evaluation procedures and forms to assess anew that they do not discriminate on the basis of disability
- e) include in professional development and other employee performance enhancement programs a component intended to make all employees aware of the intent of the ADAAA and the reaffirmation the school district does not discriminate on the basis of disability

2. Students

- a) more students may qualify for an accommodation plan under §504
 - 1) courts have considered a claimed violation of §504 in consonance with the ADA of 1990 and such will continue with the ADAAA
 - consider the impact of the inclusion of reading, concentration, thinking, communicating being listed as major life activities under the ADAAA
 - no longer entitled to consider the effect of mitigating measures, *e.g.* medication for ADHD, OCD, etc.

D. Watch for regulations!